FOR ARGUMENT



IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Boards of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, AND EDWARD M. ROWLEY,

*Petitioners,*

v.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM, AND CHARLES LAPLANTE,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF FOR THE RESPONDENTS

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*Respondents.*

## BRIEF FOR THE RESPONDENTS

### CONSTITUTIONAL PROVISIONS AND ADDITIONAL STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The following additional sections of the Nebraska statutes are pertinent hereto:

NEB. REV. STAT. § 83-1,110 (Reissue 1976).

"(1) Every committed offender shall be eligible for release on parole upon completion of his minimum term less reductions granted in accordance with this act. A committed offender shall be eligible for parole prior to the expiration of the minimum term whenever the sentencing judge or his successor in office shall give his approval for the parole of such offender.

(2) every committed offender sentenced to consecutive terms, whether received at the same time or at any time during the original sentence, shall be eligible for release on parole when he shall have served the total of the minimum terms, less reductions granted in accordance with the provisions of this act. The maximum terms shall be added to compute the new maximum term, which, less reductions granted in accordance with the provisions of this act, shall determine the date when his discharge from the custody of the state becomes mandatory."



NEB. REV. STAT. § 83-1,112 (Reissue 1976).

"(1) Each committed offender eligible for parole shall, in advance of his parole hearing, have a parole plan in accordance with the rules of the Board of Parole. Whenever the board determines that it will facilitate the parole hearing, it may furnish the offender with any information and records to be considered by it at the hearing.

(2) An offender shall be permitted to advise with any person whose assistance he desires, including his own legal counsel, in preparing for a hearing before the Board of Parole."

## STATEMENT OF THE CASE

This action was instituted pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Nebraska[1] as a class action[2] on behalf of all inmates (Respondents herein) incarcerated in the

[1] The original complaint in this action was filed on November 13, 1972 (A.1) and alleged 1) unlawful denial of parole or work release because members of the plaintiff class had exercised their rights of access to the courts; 2) denial of parole or work release because of racially discriminatory reasons; and 3) violation of the Due Process Clause in parole release and work release proceedings. The due process claims of the Inmates were dismissed, but the order of dismissal was not certified as an appealable order. The other claims proceeded to trial and were ultimately dismissed on the merits. The previous order dismissing the due process claims was vacated on the same date the other claims were dismissed. Counsel for the Inmates herein was appointed by the district court and the claims of the Inmate class were processed as a separate lawsuit.

[2] This action was certified as a proper class action on November 29, 1973 (A.1) prior to its original dismissal (*See* n. 1). When

Nebraska Penal and Correctional Complex, Lincoln, Nebraska (hereinafter referred to as "the Inmates"). The parties named as defendants (Petitioners herein) were the members of the State of Nebraska Board of Parole, in both their individual and official capacities (hereinafter collectively referred to as "the Board").

Trial occurred on May 31, 1977 (A. 1) and judgment finding that the Inmates had been denied procedural due process, specifying the minimal requirements of due process, and requiring the Board to implement procedures encompassing such requirements (A. 38-39) was entered on October 21, 1977 (A. 2).[3] A timely appeal to the United States Court of Appeals for the Eighth Circuit resulted in an Opinion (A. 2-25) affirming the district court's determination that the Due Process Clause of the Fourteenth Amendment applied to parole release proceedings but modifying the minimum requirements of due process applicable thereto. Such opinion and accompanying order (A. 40) were entered May 18, 1978.[4]

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the order of dismissal was vacated and the action reinstated, the district court ordered that it proceed as a class action, if the inmates so desired. The inmates elected to proceed on a class action basis.

[3] The Inmates' claims of denial of due process in work release proceedings and for monetary damages were dismissed by the district court. No appeal from such dismissals was taken.

[4] The Board's appeal to the Eighth Circuit also challenged the propriety of attorney fees taxed as costs pursuant to 42 U.S.C. § 1988. Such allowance was affirmed by the Eighth Circuit (A.24) and the Eighth Circuit subsequently allowed additional fees. The Board's Petition for a Writ of Certiorari did not present any question regarding such allowances of attorney fees.



The amended complaint (A. 25-29) alleged among other things that the Board failed to: 1) inform the Inmates of the criteria utilized in determining whether inmates should be placed on parole; 2) inform the Inmates of the date and time of their hearings; 3) permit the Inmates to present evidence and call witnesses; 5) permit cross-examination of witnesses appearing in opposition to parole; 6) maintain a complete and permanent record of all parole release proceedings; 7) permit representation by legal counsel and provide such counsel upon a showing of indigency; 8) provide inmates denied parole with a written statement of reasons for denial; and, 9) inform inmates denied parole of the evidence relied upon. (A. 27).

The Board consists of five members, two of which are parttime. (Pl. Ex. 3, p. 1; R. 3, 3). All such members are appointed by the Governor of the State of Nebraska. NEB. REV. STAT. § 83-189 (Reissue 1976). Under Nebraska's statutes the Board is charged with the responsibility of determining when and whether an inmate should be released upon parole. NEB. REV. STAT. §§ 83-192(1) and 83-1,114(1) (Reissue 1976).

As relevant hereto, two types of parole proceedings are conducted by the Board. The first, a case and record review (hereinafter referred to as "review hearing"), as required under NEB. REV. STAT. § 83-192(9) (Reissue 1976) and as stipulated to by the parties, is to be conducted each year, regardless of the eligibility of the inmate for parole. (A. 31). During the period of July 1, 1975 through June 30, 1976, 1,645 such review

hearings were held for inmates at the Nebraska Penal and Correctional Complex. (Pl. Ex. 3, p. 17, R. 3, 3).

The other type of proceeding conducted by the Board is a parole hearing (hereinafter "Parole hearing") required by NEB. REV. STAT. § 83-1,111 (Reissue 1976). As hereinafter discussed, such proceeding is more formalized in nature and, as stipulated, is granted only to those inmates who are eligible for discretionary parole and who are set for such a hearing by the Board after a review hearing. (A. 32-33). Between July 1, 1975 and June 30, 1976, 327 such parole hearings were held. (Pl. Ex. 3, p. 17, R. 3, 3).

Pursuant to Nebraska's statutory framework, review hearings are to include an inquiry into the circumstances of the offender's offense, presentence investigation reports, prior social history and criminal record, the inmate's conduct, employment, and attitude while imprisioned, and any physical and mental examination reports available. The Board is required to meet with the inmate and "counsel him concerning his progress and his prospects for future parole". NEB. REV. STAT. § 83-192(9) (Reissue 1976).

By contrast, NEB. REV. STAT. § 83-1,111 (Reissue 1976) governs the timing of parole hearings. Subsection (1) thereof requires a parole hearing within sixty days prior to the expiration of the inmate's minimum term less any reductions (the inmate's eligibility for Parole date as determined under NEB. REV. STAT. § 83-1,110 (Reissue 1976)). If the Board, following a parole



hearing defers an inmate for later reconsideration, a parole hearing is required to be held at least once a year until a release date is fixed. NEB. REV. STAT. § 83-1,111(4) (Reissue 1976).

NEB. REV. STAT. § 83-1,114 (Reissue 1976) provides the Board with specific statutory instructions for determining whether an inmate should be released on parole. It mandates the release on parole of any eligible inmate, unless the Board finds that:

> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1,114(1) (Reissue 1976). The Board is further provided with fourteen factors which must be considered in any parole release determination.[5]

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[5] *Neb. Rev. Stat.* § 83-1,114(2) (Reissue 1976) provides:

> In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:
>
> (a) The offender's personality, including his maturity, sta-

In practice the Board has equated the annual parole hearing requirement of NEB. REV. STAT. § 83-1,111(4) (Reissue 1976) with the review hearing requirement of

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bility, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority; particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(l) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(m) Any other factors the board determines to be relevant.



NEB. REV. STAT. § 83-192(9) (Reissue 1976). *See* Petitioner's Brief, p. 9,. Such practice results in the Board's ability to prevent otherwise eligible inmates from receiving a parole hearing by deferment following a review hearing. The deferment may be for up to one year and may occur repeatedly. Indeed, in the case of Robert Gamron, one of the inmates testifying at the trial of this matter, deferral occurred on three separate occasions, despite the inmate's eligibility for parole. (R. 26).

Review hearings and parole hearings differ markedly in the manner in which they are conducted. Review hearings last on an average from 5 to 10 minutes. (R. 16, 43). Although there was some testimony to the contrary (R. 55), the parties hereto have stipulated that inmates at review hearings are not permitted to present evidence or call witnesses in their own behalf (A.33). Additionally, inmates are neither advised of nor allowed to examine any evidence, records, etc. which might adversely affect their chance of parole. (R. 17-19, 35). For example, the Board considers the prison records of the individual but does not allow such individual to examine those records. (R. 19, 36, 46, 47, 56).

Parole hearings are more formalized in nature. At such hearings inmates are allowed to present evidence and call witnesses in their own behalf. (A. 33; R. 40, 56). However, if evidence of either a testimonial or documentary nature opposing the inmate's release on parole is received, the inmate is excluded from the

hearing room at the time such evidence is received. (A.33). The inmate is informed only that there is opposition to his parole, but is not given any explanation as to the nature of the evidence received. (A. 33; R. 59). Neither is the inmate permitted any right of cross-examination as to adverse testimony received.[6] (A.33).

Inmates are notified either at the time of their original confinement or at subsequent review hearings or parole hearings of the month during which their next review hearing or parole hearing will be held. Notification occurs from 30 days to one year in advance of the hearing and never specifies the precise date. Notification of the precise date and hour occurs through posting of such information at the Penal Complex on the date of the hearing. (A. 32; R. 35). By its own admission, the Board does not advise the Inmates of the criteria utilized in determining whether they should be placed upon parole. (R. 45). The inmates who testified at trial indicated that they had never been advised by anyone of such criteria. (R. 22, 34). Testimony presented by the Board indicated that parole counselors are charged with this responsibility

[6] It is interesting, at this point, to note one anomaly developed through the trial judge's questioning of one of the Board members. It appears that the Board does permit an inmate's legal counsel to remain in the hearing room during presentation of any such adverse testimony. (R. 68-70). However, the Board does not provide indigent inmates with legal counsel. (A. 33-34). It would thus appear that only when an inmate can afford legal counsel, can he be assured of knowledge of or attempt to rebut adverse evidence received.



(R. 50), but the testimony further indicated that in at least some instances no such communication actually occurs (R. 21, 50).

Just as the nature of the two types of hearings vary, the notification of results given to the inmates varies. In the case of review hearings, preprinted Parole Board forms are utilized to notify the inmate of the results. Deferral (the equivalent of denial) is noted on Form PB-1 (A. 35-36). If the Board should decide that the inmate is a likely candidate for parole, a parole hearing will be set and the inmate advised of such hearing through utilization of Form PB-2. (A. 36-37).

The Board customarily and uniformly utilizes the preprinted reasons checklist contained in the PB-1 for explanation of its actions. For the period of October, 1976 through March, 1977, of the 375 inmates eligible for parole but deferred following a review hearing, 285 were provided a PB-1 form on which only Item (a) had been checked. (A. 42). That Item reads as follows:

> Your continued correctional treatment, vocational, education, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date.

The Board acknowledged that in a majority of the cases this is the only reason specified for deferral.[7] (R.

[7] *Neb. Rev. Stat.* § 83-1,111 (Reissue 1976) requires a written statement of both reasons for denial and recommendations for correction of deficiencies. Form PB-1 contains a standardized

45). The testimony further established that the Inmates are not advised as to which of the alternative reasons for deferral listed in Item (a) applies to their individual cases. (R. 23, 30). Moreover, the testimony of inmate Gamron specifically establishes that when efforts are made to obtain an explanation from the Board as to the meaning of this Item or other Items, no such explanation is given. (Pl. Ex. 16, Items 18, 19 and 21; R. 27, 28). The letters contained in such Exhibit 16 chronicle the efforts made by this inmate to obtain information from the Board as to the reasons for deferral and the lack of response by the Board thereto.

If an inmate succeeds in gaining a parole hearing after his review hearing, but is denied parole, the inmate is notified of such denial by letter. For the period of January, 1975 through November, 1976, of the 81 letters of denial sent by the Board, 46 indicated simply that denial was because of a disciplinary report. (A. 45). While the phraseology was often different, many of these simply indicated the "filing" of such a disciplinary report. In eight cases no reason whatsoever was stated in the letter of notification (Pl. Ex.

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listing of six deficiencies. (A. 35-36). The Board's own testimony indicates that all six Items are always checked (R. 45). Of the 375 PB-1's referred to *supra*, 370 showed all Items 1 through 6 as having been checked (A. 42). Yet, Richard C. Walker, one of the class representatives, testified that all items were checked in his case, including Item 2, requiring participation in self-improvement programs, despite Walker's participation in all such available programs (R. 38).



12, R. 12, 12), although in some of these cases a verbal statement of the reason for denial was made at the hearing. A representative of the Board testified that these eight letters were a departure from their normal procedures (R. 57), but acknowledged that many of the other letters were insufficient in scope. (R. 63).[8]

Inmates deferred for reconsideration at a subsequent review hearing or denied parole following a parole hearing are not advised of the evidence relied upon by the Board in reaching its determination. (A. 34). With respect to both review hearings and parole hearings, a record is maintained by the Board in the form of tape recordings.[9]

Upon the basis of the foregoing facts, the district court concluded that minimal due process of law re-

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[8] It is interesting to note that while the Board attempts to comply with the requirement of *Neb. Rev. Stat.* § 83-1,114 (Reissue 1976) for a statement of recommendations for correction of deficiencies in the review hearing context (*See* n. 7), letters of denial following a parole hearing seldom contain any such recommendation.

[9] The requirements imposed by the district court and the Eighth Circuit varied slightly in this regard. The district court would require a written record (Pet. App. 42) while the Eighth Circuit required only a record capable of being reduced to writing (A. 21,24). While the Inmates find the Eighth Circuit lesser requirement acceptable, it is important that the requirement as to the quality of recordings be maintained. By stipulation (R. 58) the Board was permitted to introduce after conclusion of the trial the transcripts of eight parole hearings. These transcripts contained numerous examples of inaudible statements or responses by members of the Board or the involved inmate.

quired the Board to institute procedures encompassing items:

1) Every inmate eligible for parole under Nebraska law must be afforded a formal parole hearing;

2) At least 72 hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the Board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole;

3) Each inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations;

4) A written record of the proceedings at the parole hearing must be maintained;

5) Within a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole. (A. 38-39).

By affirming in part and reversing in part, the Eighth Circuit required:

1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the Board.



2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination.

3) Subject to security considerations, every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf.

4) A record of the proceedings which is capable of being reduced to writing must be maintained.

5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole. (A. 23-24).

## SUMMARY OF ARGUMENT

### I.

This case presents the Court with the question of whether denial of parole is the denial of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) clearly indicates that conditional liberty while on parole is an interest entitled to protection under the Fourteenth Amemdment. In so holding this

Court recognized the significant interest a prisoner has in parole. Such interest is even stronger where created by a state law which also limits the ability of the State to deny such conditional liberty. Nebraska's statutes, principally NEB. REV. STAT. § 83-1,114 (Reissue 1976) establish an inmate's right to parole and restrict the Board's ability to deny such right. Under such circumstances the Due Process Clause of the Fourteenth Amendment must apply to the parole release decision-making process. *Morrissey* v. *Brewer, supra; Wolff* v. *McDonnell,* 418 U.S. 539 (1974).

The conclusion that due process of law must be accorded to inmates involved in parole release proceedings is not altered by the existence of discretion in the Board's decision and the requirement that it consider subjective factors. Although decisions may be predictive and discretionary, the Due Process Clause nevertheless applies. *Morrissey* v. *Brewer,* 408 U.S. 471, 480 (1972). In the context of parole release proceedings, reliance upon the discretionary matters involved in concluding that due process of law does not apply would be tantamount to readopting the right/privilege dichotomy which this Court has so frequently rejected. *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Morrissey* v. *Brewer, supra.* Nor is it pertinent to argue that the Due Process Clause applies only where an adverse change in condition occurs. Even though denial of parole will not change an inmate's present status, this Court has frequently recognized that an interest protected by the Due Process Clause



is not removed from such protection because the individual involved does not presently enjoy that right.

Equally as important, however, is the nature of the interest at stake. Since parole is freedom from physical restraint, parole has been considered a protected liberty within the meaning of the Due Process Clause, *Morrissey* v. *Brewer, supra,* and the decision with respect to such interest should be subject to the Due Process Clause regardless of the existence or nonexistence of a state statute raising a presumption of release. It is the underlying interest which determines whether the Due Process Clause applies and not the underlying function of the administrative proceeding. That the proceeding is discretionary in nature rather than fact-finding in nature is not a pertinent difference. Where the decision will affect the inmate's term of confinement as opposed to the conditions of confinement, due process must apply. *Wolff* v. *McDonnell, supra.* Due process of law must, under the circumstances of this case, apply to parole release proceedings in the State of Nebraska.

## II.

Once it is determined that Nebraska parole release proceedings are subject to the Due Process Clause, this Court must then determine what process is due. *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). In arriving at a resolution of this question, the Court must balance the governmental and private interest

affected, giving due considerations to (1) the private interests involved, (2) the risk of an erroneous deprivation thereof under present procedures and the value of additional safeguards and (3) the government's interest. *Mathews* v. *Eldridge,* 424 U.S. 319, 334-335 (1976).

An inmates interest in obtaining the conditional liberty represented by parole is obviously great. But beyond this, both the inmate and the Board have concurrent interest in the accurate finding of fact and the informed use of discretion. Such interest serves the inmate's ultimate desire for freedom and serves the state's interest in neither preventing successful rehabilitation nor improperly risking the safety of society through premature release. These interest favor the imposition of minimal due process in parole release proceedings and far outweigh any administrative burden which may result to the Board.

The foregoing analysis suggests the following procedures are appropriate:

(1) Every inmate who is eligible for parole under Nebraska law must be afforded a hearing each time the parole decision is made at which the inmate is (a) entitled to appear; (b) permitted to present documentary evidence; (c) permitted, subject to prison security considerations, to call witnesses in his own behalf; and (d) allowed to hear and examine, or, if prison security considerations require, informed of any testimony received or factual information in the possession of the Board which might lead to an adverse decision.



(2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance thereof. This notice shall contain a list of the factors which may be considered by the Board in making its determination.

(3) A record of the proceedings which is capable of being reduced to writing must be maintained.

(4) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

## ARCUMENT

### I. AN INMATE'S INTEREST IN THE PAROLE RELEASE DECISION IS A LIBERTY INTEREST WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

#### A. Since Nebraska Has Created A Liberty Interest In Parole, It May Not Deprive An Inmate Of Such An Interest Without Procedural Safeguards.

The question before this Court is whether the decision to deny Parole is a deprivation of liberty within the meaning of the Due Process Clause of the Four-

teenth Amendment.[10] This determination to a certain extent requires a definition of the concept of liberty. Although the liberty guaranteed by the Fourteenth Amendment has never been exactly defined, this Court has consistently stated:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. . . . In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.

*Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). See also *Ingraham* v. *Wright*, 430 U.S. 651 (1977) (holding that a school child has a protected liberty interest in avoiding corporal punishment while in the care of public school authorities).

In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court concluded that the liberty enjoyed by a parolee while on parole was liberty within the realms of the Fourteenth Amendment and could not be terminated without some orderly process. In reaching its conclusion this Court applied a test which involved a determination not of the weight but of the nature of the interest at stake. The distinction based upon whether a parolee's interest was a "right" or a "privilege" in determining the applicability of due process was rejected, and instead the Court considered the function of parole in the correctional process and concluded that since the liberty of the parolee included many of the core values of unqualified liberty, the decision to terminate it without due process would inflict a grievous loss on the parolee. *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 484.

The question this Court is being asked to decide, however, goes not to the revocation of parole but rather to the *decision* of whether to grant or deny parole. It is necessary, therefore, to determine the nature of the inmate's interest in the parole decision.

[10] Of the circuit courts of appeals which have decided the issue, four have held the Fourteenth Amendment does apply to parole release proceedings. *See Coralluzzo* v. *New York State Parole Board*, 566 F.2d 375 (2nd Cir. 1977), cert. dismissed as improvidently granted, 435 U.S. 912 (1978); *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (2nd Cir. 1974), vacated as moot, 419 U.S. 1015 (1975); *Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978); *Bradford* v. *Weinstein*, 519 F.2d 728 (4th Cir. 1974), vacated as moot, 423 U.S. 147 (1975); *United States ex rel. Richerson* v. *Wolff*, 525 F.2d 797 (7th Cir. 1975); *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). *Cf. Hill* v. *Attorney General of the United States*, 550 F.2d 901 (3rd Cir. 1977) (by discussing the constitutional adequacy of reasons given for denial of parole, the court implies that the Due Process Clause applies). *Contra, Cruz* v. *Skelton*, 543 F.2d 86 (5th Cir. 1976); *Brown* v. *Lundgren*, 528 F.2d 1050 (5th Cir.), cert. denied, 429 U.S. 917 (1976); *Scarpa* v. *United States Board of Parole*, 477 F.2d 278 (5th Cir.) (en banc), vacated as moot, 414 U.S. 809 (1973); *Scott* v. *Kentucky Parole Board*, No. 74-1899 (6th Cir. Jan. 15 1975), remanded to consider mootness, 429 U.S. 60 (1976), reaffirmed *sub nom, Bell* v. *Kentucky Parole Board*, 556 F.2d 805 (1977), cert. denied, 434 U.S. 960 ( 1978).

The nature of an inmate's interest in the decision of the Board to grant or deny parole is an interest in the most fundamental concept of liberty, freedom from physical restraint. The Board's decision conclusively determines whether an inmate will be allowed, subject to the conditions of his parole, to be gainfully employed and free to be with family and friends and form other enduring attachments of normal life, or be subjected to continued incarceration. As the United States Court of Appeals for the District of Columbia suggested in *Childs* v. *United States Board of Parole,* 511 F.2d 1270, 1278 (D.C. Cir. 1974):

> The deprivation due to revocation of the conditional liberty enjoyed by a parolee demonstrates the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished by the government under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prisoner is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimum standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities.



The effect of the Board's decision on an inmate's liberty in a parole release proceeding is the same as that of *Morrissey,* conditional liberty versus incarceration. Where the result of such a decision is of such tremendous consequence, our system of law requires some type of notice, hearing, and statement of reasons for denial. *Cf., Kent* v. *United States,* 383 U.S. 541, 554 (1966).

Even though a prospective parolee is currently confined, there is a right to be considered for parole under state law and the privilege of an earlier release if the Board grants parole. *Bradford* v. *Weinstein,* 519 F.2d 728, 732 (4th Cir. 1974). It is the Board's decision of whether to grant or deny parole which must be subject to the protections afforded by the minimum procedures of due process. Only by affording the minimum procedures of due process can an inmate be assured that his interest in parole is not arbitrarily abrogated.

The State of Nebraska by statute has created the inmates' interest in parole. However, as was stated in *Wolff* v. *McDonnell,* 418 U.S. 539, 588 (1974):

> [A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.

This statutorily created liberty interest in parole is indistinguishable from an inmate's statutorily created

interest in good time credit which this Court in *Wolff* v. *McDonnell, supra,* held to be a protected liberty interest. In that case, Mr. Justice White stated:

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to be a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers* v. *McElroy,* 367 U.S. 886, 894, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). But the state having created the right to good time and itself recognizing that its depreviation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

*Id.* at 557.

Nebraska has not only statutorily created the inmate's right to be considered for parole, but in addition has prescribed specific factors which must be considered and the criteria which must be present before parole can be denied. Under the Nebraska statutory scheme, an inmate must be released on parole



unless the Board finds the individual unfit for parole because one or more specified criteria are present. NEB. REV STAT. § 83-1,114 (Reissue 1976). The Nebraska statute clearly limits the discretion of the Board in denying parole, and thus, the expectation the inmate has in being granted parole triggers procedural due process protection. Whether that expectation is regarded as an entitlement, a presumption of release, or whether it is simply based upon the use of the word "shall" by the Nebraska legislature[11] in di-

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[11] The Board suggests that the word "shall" in *Neb. Rev. Stat.* § 83-1,114(1) (Reissue 1976) should be read as "may". *See,* Petitioners' Brief at 19. Even if this Court were to accept this argument the analysis and result would not change. § 83-1,114 is very similar in structure and content to Nebraska's sentencing statute, *Neb. Rev. Stat.* § 29-2260 (Reissue 1976) which provides in part:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony, the court *may* withhold sentence of imprisonment unless . . . the court finds that imprisonment is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.

There follows, a listing of 11 factors, many of which are objective, which the court must consider. Thus, although addressed to different yet analagous process (*See,* n. 13 and 24, *infra.*), the two statutes are almost identical excepting the use of the word "may" in the sentencing statute. Yet, this Court has held that

recting the Board, the interest is "more than an abstract need or desire . . ., more than a unilaterial expectation" of release. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); it is an expectancy that "has real substance"; *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 577; *cf. Goss* v. *Lopez*, 419 U.S. 565, 576 (1975).[12]

In addition to this precise statutory framework giving rise to a protected liberty interest, the nature and function of parole in a state's correctional system reinforces an inmate's entitlement to parole. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), the Chief Justice recognized that parole is an integral part of the penological system.

> Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined to the full term of the sentence imposed. It also serves to alleviate the cost to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of his sentence.

*Id.* at 477. (footnotes omitted). Even more important, however, is the recognition that "the parole process is inseparable from the sentencing process." Sigler, *Abolish Parole?*, 38 Fed. Prob. 42, 47 (June 1975). In President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* 86 (1967), the Commission concluded:

> [T]oday parole boards and judges are expected to exercise their discretion to determine the proper sentence . . . parole legislation involves essentially a delegation of sentencing power to parole boards. The parole decision involves many of the same kinds of factors that are involved in the original sentencing decision.

In short, "the function of parole boards at release hearings and of judges at sentencing are virtually identical." Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 Cal. L. Rev. 1518, 1534 (1972).[13]

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the Due Process Clause applies to sentencing, e.g., *Gardner* v. *Florida*, 430 U.S. 349 (1977), as has the State of Nebraska, *State* v. *Richter*, 191 Neb. 34, 214 N.W.2d 16 (1973). The United States analysis apparently would not change since, even accepting the Board's reading of "shall" as "may", it has stated that specification of "particular facts that govern the release decision", as in § 83-1,114(2) (Reissue 1976), would trigger due process protections. Amicus Brief of U.S. at 32.

[12] The inmates agree with the Amicus Brief of the United States that the Nebraska statute gives rise to a liberty interest in parole since a presumption in favor of parole is created giving a Nebraska inmate a legitimate entitlement to release on parole, subject to defeasance only if the parole authorities find one or more of a limited number of grounds for denial are present. *See*, Amicus Brief of U.S. at 35. The Inmates, however, feel this presumption is not created by the particular words of the statute but rather this presumption is created by the existence of the right to parole under a state's correctional system regardless of whether it is a mandatory or permissive system. *See*, I.B. of Brief, *infra*.

[13] See n.24, *infra*, for a discussion of the impact of this similarity between parole and sentencing upon the question of the procedures which are due.

With the recognition of the importance of parole in the criminal process by society, judges, and this Court, it is of the utomost importance that this Court now recognize that the denial of parole is the deprivation of liberty within the meaning of the Due Process Clause.

Where, as here, a statute creates a liberty interest in the parole release decision, this Court's decisions in *Meachum* v. *Fano,* 427 U.S. 215 (1976) and *Montanye* v. *Haymes,* 427 U.S. 236 (1976) do not alter the conclusion that the Due Process Clause applies. Reliance thereon, *see,* Petitioners' Brief at 25, is therefore misplaced since both cases are quite distinguishable.

Both *Meachum* v. *Fano, supra,* and *Montanye* v. *Haymes, supra,* were prison transfer cases. Obviously, the interests involved there are quite distinguishable from those involved in the parole release decision. A transfer from one prison to another is much different than a transfer from a prison to the outside world. Certainly, both involve a change of environment, but the former involves only the place of incarceration, while the later involves conditional liberty. To rely upon these cases would be to look to the "weight" and not the "nature" of the interest at stake. *Board of Regents* v. *Roth, supra,* 408 U.S. at 570-571.

More importantly, in the transfer cases there was no statutory limitation on the discretion of the institution to be enforced. In *Meachum,* the Court found that "it is too ephemeral and insubstantial to trigger



procedural due process protections as long as prison officials have discretion to transfer [the prisoner] for whatever reason or for no reason at all." Id. at 228. Similarly, in *Montanye,* the Court stated:

> We held in *Meachum* v. *Fano* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, *absent some right or some justifiable expectation rooted in state law* that he will not be transferred except for misbehavior or upon the occurrence of other specified events.

*Montanye* v. *Haynes, supra,* 427 U.S. at 242 (emphasis added).

Quite the opposite is present here. The Board's discretion is limited by state law, and the prisoner does have a right and justifiable expectation rooted in state law to a release on parole.

### B. The Presence Of Discretion In The Parole Release Process Does Not Require A Conclusion That Due Process Should Not Apply.

The Board suggests that in order for an inmate to have a right which gives rise to procedural due process, the denial of a right must be conditioned upon findings of specific facts as opposed to subjective conclusions; and, since the Board's decision is not based upon specific findings of fact but rather subjective

determinations, due process is inappropriate. *See* Petitioner's Brief at 21. Granted, the decision of the Board is in large part discretionary and requires subjective expertise on the part of the Board. This does not, however, remove the determination from the coverage of the Due Process Clause, rather it increases the need for minimum procedural protection. Again, reference to the Court's discussion in *Morrissey* is appropriate. There, the Chief Justice recognized that the decision to revoke parole was not only based upon the factual determination of whether the parolee violated parole, but was also based on a determination by the parole board of whether the parolee should be recommitted to prison or whether other steps should be taken to protect society and improve chances of rehabilitation. Chief Justice Burger stated:

> The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. *Yet this second step, deciding what to do about the violation once it is identified, is not purely factual but also predictive and discretionary.*

*Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) (emphasis added).



It is not possible to distinguish a decision of the Board in a parole release proceeding from a decision to revoke parole. Both involve a prediction by the Board of the risk an individual will pose to society and the readiness of the community to accept or to continue to accept the individual within its fold. Just as the Board's decision regarding revocation is based not only on objective determinations of facts but also upon non-factual predictions and discretion, so too is the Board's determination of whether to grant or deny parole based on objective facts and subjective concerns. Moreover, NEB. REV. STAT. § 83-1,114(2) (Reissue 1976), requires the Board to take into account 14 factors in making its determination regarding release on parole. Factors such as the "offender's intelligence and training"; "the offender's past use of narcotics, or past habitual and excessive use of alcohol"; "the offender's family status"; or, "the type of residence, neighborhood or community in which the offender plans to live"; etc., all involve objective facts. The minimum requirements of due process will insure that these factors are accurately and correctly made available for the Board.

The Board's decision conclusively determines whether the inmate will be granted conditional liberty or forced to continue his present incarceration. An inmate's liberty interest, therefore, could be unjustifiably denied because of incorrect information or because of an erroneous evaluation of these factors, resulting in the inmate being "condemned to suffer

grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). It would be a grievous loss indeed for a prisoner, by reason of essentially an ex parte proceeding and the associated increased risk of error, to be denied parole and required to serve more of his term because the Board relied on data that was erroneous or because the attention of the Board was not called to data tending to indicate that parole should be granted, or for some other mistake regarding the 14 factors enumerated in the Nebraska statute. *See Bradford* v. *Weinstein*, *supra*, 519 F.2d at 732. Where the Board is to take into account numerous objective factual considerations in reaching a discretionary decision, the requirements of due process must be afforded.

Nevertheless, the Board suggests that where the administrative action is not conditioned on factual determinations, but rather on the prison officials' complete discretion, the requirements of due process are inappropriate. *See* Petitioners' Brief et 25. *Morrissey* openly rejected the argument now raised by Petitioners.

> Nor are we pursuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion.

*Id.*, 408 U.S. at 483.



The Board next argues that the detailed factors to be taken into account under NEB. REV. STAT. § 83-1,114 (Reissue 1976), are simply a reflection of the legislature's awareness that a grant of authority to the Board in its unfettered discretion might not pass muster in the Nebraska Supreme Court, and thus, the factors are simply instructions to the Board as to the factors it is to take into account in reaching its decision. *See,* Petitioners' Brief at 18, 19. Even if this is an accurate articulation of the legislative intent, this discretionary authority does not mean the parole board can act arbitrarily. In *Kent* v. *United States*, 383 U.S. 541 (1966), this Court reviewed the discretion conferred upon the juvenile court system, stating:

> The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the juvenile court to determine in isolation and without participation for any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.

*Id.* at 533.

Although the Nebraska statute may give the Board a substantial amount of discretion as to the factual considerations to be evaluated, the weight to be given them, and the conclusion reached, the statute does

not confer upon the Board a license for arbitrary procedure. The Due Process Clause does not permit the Board to determine without minimum procedures the "critically" important question whether an inmate will be denied liberty.

It is even more important, however, that this Court recognize that to suggest an inmate does not have a liberty interest in a parole release proceeding where the decision is completely discretionary is to suggest there is no right to parole only a privilege. It is particularly appropriate to analyze the Board's argument in light of cases where this Court applied the right versus privilege doctrine to demonstrate that it is the same distinction, merely phrased differently. In *Barsky* v. *Board of Regents of University,* 347 U.S. 442 (1954), this Court held the State of New York could suspend a physician's license without complying with the procedural requirements of the Fourteenth Amendment because of the physician's conviction in federal court of a misdemeanor for failing to produce subpeonaed papers before a congressional committee. Mr. Justice Frankfurter, dissenting, pointed out the problems with such an unfettered control of discretion inherent in the right versus privilege distinction:

> It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on artibrary, whimsical or irrational considerations. A license cannot be revoked because a man is red-headed or because he was divorced, except for a calling, if such there be, for which red-headedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids.



*Id.* at 470, (Frankfurter, J., dissenting) (footnotes omitted).

The United States' and the Board's argument is that an inmate has no constitutional right to due process of law since he has no protected liberty interests when the decision is completely discretionary, the state having a right to grant or deny parole for any reason or no reason at all. This analysis of the state's discretionary power to grant or deny parole can be paralleled with the Supreme Court's holding in *Barsky.* That is, a physician has no constitutional right to due process of law since the state's decision to revoke that privilege is totally discretionary; it may deny a person the right to be a doctor for any reason or no reason at all.

The argument seems to be that in a parole revocation proceeding the individual has a right not to be

restrained, whereas in the parole release decision the interest is a privilege of release from restraint. This historical dichotomy of protection depending upon whether something is a right or a privilege has in more recent times been openly and repeatedly rejected by this Court. See *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564, 571 (1972). The test this Court has consistently applied since the rejection of that doctrine is based rather on the nature of the interest involved. *Board of Regents* v. *Roth, supra* at 570-71. Since *Morrissey* v. *Brewer,* parole has been considered conditional liberty representing an interest entitled to due process protection. An inmate's interest in the parole board's decision to grant or deny parole must be treated the same. "To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis." *United States ex rel. Johnson* v. *Chairman, N.Y. State Bd. of Parole,* 500 F.2d 925, 928 (2nd Cir. 1974). Whether the immedate issue is release or revocation, the stakes are the same: conditional liberty versus incarceration. The purpose of the minimum procedures of the Due Process Clause is to insure that this decision will not be made arbitrarily or erroneously.

The Board finally attempts to distinguish the denial of parole from parole revocation by suggesting that the Due Process Clause applies only when there is an adverse change in a condition as opposed to a continuation of a condition. *See,* Petitioners' Brief at 14-16. This Court, however, on numerous occasions



has held that an individual is entitled to a fair determination of a protected interest even where the individual does not presently enjoy that right. *E.g., Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963), *Konigsberg* v. *State Bar,* 353 U.S. 252 (1957), and *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) (admission to the Bar); *Speiser* v. *Randall,* 357 U.S. 513 (1958) (application for tax ememption); *Simmons* v. *United States,* 348 U.S. 397 (1955) (application for draft exemption); *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117 (1926) (application for admission to practice before Board of Tax Appeals). *See also Pence* v. *Kleppe,* 529 F.2d 135 (9th Cir. 1976) (Indian's application for land grant) and *Hornsby* v. *Allen,* 326 F.2d 605 (5th Cir. 1964) (application for a liquor license). The inmate's interest in the parole decision must likewise be subject to the minimum procedures of due process to insure that there is a fair determination of the inmate's parole, and to insure that parole is not erroneously or arbitrarily denied.

### C. Since The Parole Release Decision Affects An Inmate's Term Of Confinement, An Inmate Has A Liberty Interest In That Decision Even Where The State Statute Does Not Give Rise To A Presumption Of Release.

Under the present Nebraska statutory scheme creating the inmate's interest in parole, an inmate has a protected liberty interest because the Board's discretion is limited by the legislative criteria in determin-

ing whether to grant or deny parole. Complete reliance, however, on the language of the Nebraska statute utilized in setting forth the statutory scheme for parole is inappropriate and unacceptable for two reasons. First, if as the Board has suggested the Nebraska statute does not condition denial of parole based upon any factual determinations but solely on the subjective determination of the board as to the propriety of giving the particular inmate a parole, the parole system in Nebraska is not different from that in any other state where a parole board is given discretionary authority to grant or deny parole. Second, and more important, if this Court's decision is based upon the fact that the Nebraska statute creates a statutory presumption in favor of parole, Nebraska may avoid any constitutional procedural requirements by amending its statutes to eliminate the presumption in favor of release. *See,* Amicus Brief of U.S. at 37 n. 19; Petitioners' Brief at 18. It is therefore necessary to determine whether an inmate has a protected liberty interest in a parole board's decision to grant or deny parole where that decision is completely discretionary.

The United States in its Amicus Brief suggests that where there is not statutory presumption and no determinable set of facts that could give rise to an entitlement, the process of determining the facts cannot result in the deprivation of any entitlement; in such circumstances, the procedural protections of due process are not implicated. *See,* Amicus Brief of U.S.



at 30. The United States cites as authority Mr. Justice White's concurring and dissenting opinion in *Arnett* v. *Kennedy,* 416 U.S. 134, 181 (1974), wherein he stated:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided . . . no conditions at all, . . no hearing is required.

Reliance upon this language in the context of a liberty interest is, however, unfounded. As Mr. Justice White stated in *Arnett* v. *Kennedy, supra* at 178 n. 6:

> My views as to the requirments of due process where property interests are at stake does not deal with the entirely separate matter and requirements of due process when a person is deprived of liberty.

Additionally, the Board, California and Oklahoma suggest that since the inmates interest in the Board's decision to grant or deny parole is but a mere expectation or hope of achieving a protected status it is not a liberty interest within the meaning of the Due Process Clause. The logic of these arguments depend upon one basic assumption. That is, this Court must assume that an inmate's interest in the parole decision is either a property interest or assume that the analysis of liberty within the Due Process Clause is the same as the analysis of a property interest. Granted, the source of liberty like a property interest may be created by state law. *Wolff* v. *McDonnell, supra,* and

at times "the analysis as to liberty parallels the accepted due process analysis as to property." *Id.*, 418 U.S. at 557. Liberty, however, within the meaning of the Due Process Clause is separate from the meaning of property. *Arnett* v. *Kennedy,* 416 U.S. 134, 178 n. 6 (1974) (White, J., concurring in part and dissenting in part).

The question is not whether the inmates interest is a property interest, but rather the question is whether an inmate has a liberty interest in a parole release proceeding where the decision is completely discretionary with the Board; thus, the analysis regarding property interests is inappropriate. In defining property interests this Court has used such language as "entitlements"; "more than an abstract need or desire"; "more than a unilateral expectation"; an individual in order to have a property interest must instead have "a legitimate claim of entitlement to it." *Board of Regents* v. *Roth, supra,* 408 U.S. at 577. When dealing with property interests, it is necessary to undertake such an analysis. However, since there is still a fundamental distinction between an individual's liberty and an individual's interest in property, the inmate's interest must be viewed in light of a liberty definition.

The definition of liberty for the purpose of the Due Process Clause can be found not only in statutorily defined rights, but also in the accepted definitions of liberty. Without a doubt, liberty denotes immediate freedom from bodily restraint. *Meyer* v. *Nebraska,*



262 U.S. 390, 399 (1923). Since parole is freedom from physical restraint, parole has been considered a protected liberty within the meaning of the Due Process Clause. *See Morrissey* v. *Brewer,* 408 U.S. 471 (1972). Because the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law, Nebraska may not deny an inmate this liberty interest without due process of law.

The liberty interest at stake in the parole release decision is immediate conditional freedom. Whether that interest is based upon a decision stemming from a factual finding of designated legislative criteria or whether that decision is based upon completely subjective discretionary determinations by the Board, the interest is still the same. It is this underlying interest which determines whether Due Process applies and not the underlying function of the administrative proceeding.

The underlying liberty interest in the parole release decision is made clear in comparing the decisions of *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), and *Meachum* v. *Fano,* 427 U.S. 215 (1976). Under the particular state statute in *Wolff,* there were two kinds of punishment for flagrant or serious misconduct.

> The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disci-

> plinary cell, involves alteration of the conditions of confinement.

*Id.*, 418 U.S. at 547.

In determining whether due process applied this Court distinguished between a decision involving an inmate's term of confinement as opposed to a decision involving the conditions of confinement. This distinction was clearly made in *Meachum* v. *Fano* where this Court held that a prison transfer proceeding was not subject to due process requirements even though the prison transfer adversely affected an inmate's conditions of confinement.

The decision to grant parole does not deal with a decision involving the conditions of confinement but deals rather with a determination of the term of confinement. While the effect of the Board's decision on the inmate's term of confinement is not as immediate as in a parole revocation proceeding, it is certainly more immediate than the effect of the decision to revoke good-time credits. This Court, in determining the extent of the minimum procedures required under the Due Process Clause in revoking good-time credits in *Wolff*, compared the effect of parole revocation to the denial of good-time credits on an inmate's term of confinement.

> Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a 'grievous loss' on the parolee and often on others." *Morrissey, Id.*, at 482, 92 S.Ct. at



> 2601. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance.

*Wolff* v. *McDonnell*, 418 U.S. at 560-561.

Similarly denying parole will not work any immediate change in the conditions of the inmate's liberty but will only continue his present incarceration; and thus, the effect on the inmate's interest is not as serious as the revocation of parole. Nevertheless, the effect on the term of confinement in a parole release proceeding is much more immediate than the effect on the term of confinement in revoking good-time credits. Parole is an immediate release and a conditional termination of the term of confinement as op-

posed to a possible earlier future release. Moreover, the revocation of good-time credits does not work any change in the condition of liberty, whereas parole involves a complete change in the conditions of liberty. Therefore, since the interest at stake is the inmate's conditional liberty, the need for the minimum procedures of due process in a parole release proceeding is even stronger than in *Wolff* v. *McDonnell, supra,* and must be afforded.

## II. DUE PROCESS REQUIRES AT A MINIMUM NOTICE, A MEANINGFUL HEARING, A RECORD OF THAT HEARING, AND A STATEMENT OF REASONS FOR DENIAL.

Once it is determined that due process applies to the parole release decision, the question remains: how much process is due. *Morrissey* v. *Brewer, supra,* 408 U.S. at 481. The determination of this issue will depend on the competing interests involved, and on the particular statutory scheme adopted by the Nebraska legislature. It is necessary to consider the Nebras. a statutory scheme in determining what process is due since the State of Nebraska has defined the liberty guaranteed. The Constitution, on the other hand, defines the procedures which must be complied with in making that decision. See *Arnett* v. *Kennedy,* 416 U.S. 134, 185 (1974) (White, J., concurring in part and dissenting in part).

The minimum procedures required by the Due Process Clause must depend upon the circumstances sur-



rounding the parole release proceeding and the particular demands of such a system.[14] There are several competing interests which must be considered in formulating the standards which are applicable. As this Court noted in *Mathews* v. *Eldridge,* 424 U.S. 319, 334-335 (1976):

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d. 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d. 484 (1972). Accordingly, resolution of the issue . . . requires analysis of the governmental and private interests that are affected. *Arnett* v. *Kennedy, supra,* 416 U.S., at 167-168, 94 S.Ct., at 1650-1651 (Powell, J., concurring in part); *Goldberg* v. *Kelly, supra,* 397 U.S. at 263-266, 90 S.Ct., at 1018-1020; *Cafeteria* v. *McElroy, supra,* 367 U.S., at 895, 81 S.Ct., at 1748-1749. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private inter-

[14] The Inmates have not attempted to identify and rely upon any specific decision of this Court as providing the model for identifying the elements of due process applicable hereto. Each case must be examined on its own factual basis and the requirements of due process molded to fit the specific facts presented. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). However, bacause of the near identity of interests at stake, the Inmates would submit that the present case is most closely analogous to *Morrissey* v. *Brewer,* 408 U.S. 471 (19729.

> est that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See e.g., Goldberg* v. *Kelly, supra,* 397 U.S., at 263-271, 90 S.Ct., at 1018-1022.

It is important, therefore, to initially consider the overall importance of the parole decision to an inmate and contrast this with the government's interests. It is generally accepted that the two main goals of a parole board's decision, whether it be the decision to revoke parole or the decision to grant parole in the first instance, are to predict accurately the risks a person will pose to society, and to forecast the ability of the community to provide an acceptable environment for the prisoner. *See, Morrissey Brewer, supra,* 408 U.S. at 480. An inmate's interests in insuring that this determination is not erroneously made or based upon mistaken information is enormous. At stake for the inmate is conditional liberty. He has an interest in the release decision being made on the basis of accurate data.[15] He has an interest in being free from an arbitrary decision. He has an interest in

[15] Instances of inaccurate information contained in an inmate's file are not uncommon. *cf. Franklin* v. *Shields,* 399 F. Supp. 309, 313 (W.D. Va. 1975), affirmed in part, reversed in part, 569 F.2d 784 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978) (finding of fact that Virginia Parole Board relies on factually



> not having the decision influenced by irrational, inconsistent or impermissible criteria.

erroneous information never verified by the Board); *Kohlman* v. *Norton,* 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); *Leonard* v. *Mississippi State Probation and Parole Board,* 373 F. Supp. 699 (N.D. Miss. 1974), reversed, 509 F.2d 820 (1975), cert. denied, 423 U.S. 998 (1975) (prisoner denied parole on the basis of illegal disciplinary action); *Masiello* v. *Norton,* 364 F. Supp. 1133 (D. Conn. 1973) (unsupported hearsay allegation, that petitioner would ally with father if released, insufficient basis for parole denial); *In re Rodriguez,* 14 Cal.3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (file material, later proven in error, led parole officers to believe that prisoner, a nonviolent sex offender, had violent tendencies. 14 Cal.3d at 648 n.14; parole evaluation asserted that "family rejects him," when in fact prisoner had a home and employment in family business waiting for him. *Id.* at 651 n.16); *State* v. *Pohlabel,* 61 *N.J. Super.* 242, 160 A.2d 647 (1960) (presentence report erroneously stated, among other errors, that prisoner was under a life sentence in another jurisdiction); A. Bruce, A. Harno, E. Burgess, J. Landesco, *The Workings of the Indeterminate-Sentence Law and the Parole System in Illinois* 77 (1928) (parole board files inconsistent, ambigous, and incomplete); D. Dressler, *Practice and Theory of Probation and Parole* 115-16 (2d ed. 1969) (files often contain incomplete and erroneous information); Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, 88, 91 (1974) (denial of parole, because of failure to utilize educational programs, by board member unaware that no such programs then existed at unit to which prisoner was assigned; misleading effect of vague and conclusory characterization of disciplinary violations); Final Report of the Joint Committee on Prison Reform of the Texas Legislature 89 (1974) ("[T]he Board has denied parole for reasons later discovered to be unfounded that might have been corrected if the inmate had had access to his files"); Hearings Before Subcommittee No. 3 of the House Judiciary Committee, 92d Cong., 2d. Sess. at 451 (1972) (testimony of Dr. Willard Gaylin) ("I have seen black men listed as white and Harvard graduates listed with borderline IQ's");

It is equally clear that the government also has an interest in the parole release decision. Its interest, however, is not only limited to the increased administrative burdens that may result or the maintenance of an efificient administration of the parole system. In light of the two main goals of parole, the state along with society in general has an interest in insuring that the parole decision is not arbitrarily made and is based upon all available data. The role of parole in the criminal justice system and the rehabilitation process requires that the integrity of the parole decision be maintained through a just, reasonable and procedurally fair process. In short:

> [b]oth the . . . [prospective] parolee and the State have interest in the accurate finding of fact and the informed use of discretion—the . . . [prospective] parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

*Gagnon* v. *Scarpelli*, 411 U.S.778, 785 (1973).

The primary interest that the Board can legitimately assert in opposition to the suggested due process requirements is the increased administrative burden that might result. This Court, however, has previously placed such contentions in their proper perspective. In *Breed* v. *Jones*, 421 U.S. 519 (1975),



the Court readily acknowledged "that the flexibility and informality of juvenile proceedings are diminished by the application of due process standards", but replied: "Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions." *Id.* at 535 n. 15. And in *Gagnon* v. *Scarpelli, supra*, the Court recognized that "[s]ome amount of disruption inevitable attends any new constitutional ruling." 411 U.S. at 782 n. 5. This Court has reiterated on a number of occasions that 'the Constitution recognizes higher values than speed and efficiency." *Stanley* v. *Illinois*, 404 U.S. 645, 656 (1972); *See, Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973); *Bell* v. *Burson*, 402 U.S. 535, 540-41 (1971).

With the foregoing discussion in mind, it is appropriate to state the nature of the safeguards the Inmates contend are minimally mandated by the Due Process Clause, recognizing 'that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer, supra*, 408 U.S. at 481. Obviously, the full panoply of rights afforded in a criminal proceeding is not appropriate or necessary in parole release proceedings. *See, e.g., Franklin* v. *Shields*, 569 F.2d 784, 800 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978); *Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. (1975). *See also Wolff* v. *McDonnell, supra*, 418 U.S. at 556; *Morrissey* v. *Brewer, supra*, 408 U.S. at 482 n. 8. Rather, weighing

the interests invloved, the Inmates submit that it is necessary to select only those due process safeguards designed to insure the prisoner a meaningful opportunity to be heard and to know and rebut factual information upon which an adverse decision may be predicated; to apprise the prosepective parolee of the reasons and essential factual base for an adverse decision; and to preclude the possibility of arbitrary decision making by the Board. To achieve these ends, the Inmates urge that the following procedures be adopted by the Court as those required in parole release proceedings:[16]

(1) Every inmate who is eligible for parole under Nebraska law must be afforded a hearing each time the parole decision is made at which the inmate is (a) entitled to appear; (b) permitted to present documentary evidence; (c) permitted, subject to prison security considerations, to call witnesses in his own behalf; and (d) allowed to hear adverse testimony and examine adverse factual information in the possession of the Board, or, if prision security considerations re-

[16] The Inmates originally requested the right to counsel in parole release proceedings (A.27), but have not pursued such claim because the Board presently permits leagal counsel to be present and assist inmates at parole hearings and because *Neb. Rev. Stat.* § 83-1,112(2) (Reissue 1976) guarantees inmates the right to advise with any persons of their choosing in preparing for a hearing before the Board. The Inmates submit, however, that absent such a statute and practice, they would be entitled to at least the assistance of an advocate as suggested in the *Amici* Brief of the plaintiff Class in *Childs* v. *United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974).



quire, informed of any testimony received or factual information in the possession of the Board which might lead to an adverse decision.

(2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance thereof. This notice shall contain a list of the factors which may be considered by the Board in making its determination.

(3) A record of the proceedings which is capable of being reduced to writing must be maintained.

(4) Withing a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

### A. Under The Nebraska Statutory Scheme, An Inmate Is Entitled To A Hearing Each Time The Parole Desision Is Made.

Without question, once it is determined that there is an interest protected by the Due Process Clause, a hearing is required. *See Wolff* v. *McDonnell*, 418 U.S. 539, 557-58 (1974). *See also, Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). The Eighth Circuit required at a minimum that a formal hearing be held only when the inmate first becomes eligible for parole with subsequent parole release hearings to be held only in the discretion of the Board. (A. 18, 23).

Since the inmate's liberty interest is affected each time the Board decides whether to grant or deny parole, the minimum requirements of due process, including that of a hearing, must attach each time the decision is made.[17] Under the Nebraska statutory scheme, since the state has procided that the decision to grant or deny parole is to be made once a year after a prisoner serves his minimum sentence, the minimum procedures of due process must be afforded once a year.[18]

[17] The Board suggests that the requirement of a due process hearing may result in undesirable judicial review of the actions of the Board. *See* Petitioner's Brief at 33. At the outset, it is important to point out that review may be obtainable by a Petition in Error to the state district court under the present system. *See, Neb. Rev. Stat.* § 25-1901 et. seq.(Reissue 1976). But even more important, the fact that a constitutionally required hearing may result in increased judicial review is not a pertinent consideration in determining either whether due process applies or what the minimum procedures will be. The Court has previously recognized that where fundamental constitutional rights are at stake in proceedings involving correctional institutitions such review may be appropriate. *Wolff* v. *McDonnell*, 418 U.S. 539, 565 (1974). In any event, the question of whether judicial review will be obtainable in either state or federal court is better decided at the time such a review is actually sought.

[18] The United States argues at pages 42-43 of its Brief that hearings at or near the date of inmate's initial eligibility for parole would be pointless and the 'Due Process Clause does not require the state to conduct a charade in these cases.'' The Board similarly argues at page 30 of its Brief that few inmates will be paroled as a result of the hearing who would not have been under present procedures. These arugment, however, miss the mark for several reasons. First, as previously shown the Nebraska legislature has seen fit to require such hearings. The wisdom of such



NEB. REV. STAT. § 83-1,111 (Reissue 1976), provides that an inmate is entitled to a parole release hearing within 60 days before the expiration of his minimum term less any reduction.[19] NEB. REV. STAT. § 83-1,111(4) (Reissue 1976) additionally provides that if the parole board defers the case for later consideration, or in effect denies parole for up to a year, *the inmate shall be afforded a parole hearing at least once a year until a release date is fixed.* In other words, it is clear that the parole release decision is to be made once a year and each time this decision is made, the minimum requirements of dueprocess must be afforded.[20] While it certainly is true that the minimum pro-

requirement is not here at issue. Second, it is pure speculation, without support in the record, to suggest that few if any additional inmates will be paroled as a result of the more thorough considerations the Inmates advocate herein. Third, both the Board and the United States ignore in this argument the beneficial effect, from a correctional standpoint, which such hearings will have. A hearing, even though resulting in a denial can assist in alleviating frustration on the part of the inmate and promote rehavilitative goals.

[19] Although the Nebraska statute clearly states that an inmate is entitled to a parole hearing, under the present practice of the parole board, it does not appear that in fact such a hearing is given. Rather a review hearing pursuant to *Neb. Rev. Stat.* § 83-192(9) (Reissue 1976), is frequently held in its place with only the possibility that a formal parole hearing will subsequently be held. *See,* Petitioners' Brief at 9.

[20] Again it appears that under the present practices of the parole board an inmate is not afforded a formal parole hearing each year. Instead the review hearing as authorized in *Neb. Rev. Stat.* § 83-192(9) (Reissue 1976) is used as a substitute for the parole hearing. *See,* A. 32 and petitioner's Brief at 9.

cedures of due process require an initial hearing, in light of the Nebraska legislative scheme requiring a decision each year, a hearing must be afforded each time this decision is made.[21]

In addition to these statutory requirements, NEB. REV. STAT. § 83-192 (Reissue 1976), sets out additional duties and functions of the Board. Along with the responsibility of determining the time of release on parole of a committed offender eligible for such re-

[21] There is no question that an inmate must be afforded a formal parole hearing at some point in the parole release process. Under Nebraska law, an annual hearing is required. Nebraska's required annual hearing is particularly appropriate in view of the fact that the release of an inmate on parole is upon the initiative of the Board of Parole, rather than upon application of the inmate. *Neb. Rev. Stat.* § 83-1,111(5) (Reissue 1976). In other states where the parole release process is invoked by application of the prisoner, the parole authority no doubt has an interest in circumscribing the ability of inmates to force repeated, but futile, parole hearings simply through the filing of new applications for parole. Perhaps the decision as to the frequency with which parole hearings should be held, absent statutory direction, should be left to another case or the Court may conclude that such states should be directed to hold periodic hearings, leaving to the discretion of the states the establishment of the frequency thereof, subject, however, to a requirement of reasonableness.

The United States acknowledges, *See* Amicus Brief of United States at 37 n.19, that under the law of most states and under federal law, inmates have a right to consideration for parole at a particular time, but asserts 'this case does not involve a contention that any person, otherwise eligible for parole, was denied consideration." Such assertion is obviously incorrect. The Inmates have and do content that there is a right to consideration annually and that the Board has effectively denied this right through its improper use of review hearings.



lease, NEB. REV. STAT. § 83-192(9) (Reissue 1976) provides that the Board shall review the record of every committed offender at least once a year. This review has been referred to herein as a "review hearing" and under the Nebraska scheme is completely independent of the parole release decision. This is evident by the fact that under NEB. REV. STAT. § 83-192(9) (Reissue 1976) the review hearing is afforded every inmate whether or not eligible for parole; and, the factors that are to be reviewed are specifically set out in that section. On the other hand, the factors for determining release on parole under NEB. REV. STAT. § 83-1,111 (Reissue 1976) are set out in NEB. REV. STAT. § 83-1,114 (Reissue 1976). Although some of the factors in § 83-1,114 are similar to § 83-192(9), the factors are listed separately and do include different and separate considerations. It appears, therefore, that the Nebraska Legislature anticipated that the review hearing was not to be used to replace the annual hearing specified in § 83-1,111(4).

Respondents are not suggesting that the minimum procedures of due process apply to the review hearing, if it is used for the purpose the legislature intended. The purpose and function of the review hearing is not to determine or deny parole, but serves an independent and important function in the rehabilitation process. However, if under the practices and procedures of the parole board, the review hearing is used by the parole board as a substitute for the parole hearing specified under NEB. REV. STAT. § 83-1,111(4) (Reissue

1976) then the review hearing takes on a different function.[22] If, pursuant to a review hearing, an inmate is deferred for up to a year, the review hearing has in effect become his parole hearing and he has then been denied conditional liberty for that year. Under these circumstances, the minimum procedures required by the Due Process Clause must be complied with to insure that the right of parole is not arbitrarily abrogated.[23]

### B. An Inmates Right To A Meaningful Hearing Includes The Right To Be Present; To Present Documentary And Testimonial Evidence; And, To Be Advised Of And Permitted To Rebut Adverse Evidence.

It has been said: "Authorities on parole procedures regard well conducted hearings as vital to effective decision-making, in terms of expanding the information available to the Board as well as to their effect on offenders." President's Commission on Law En-

[22] The Board acknowledge that the reivew hearing is used by the parole board as a substitute for a formal parole hearing not only when an inmate initially becomes eligible for parole, but also to meet the requirements *Neb. Rev. Stat.* § 83-1,111(4). (Reissue 1976) *See,* Petitioner's Brief at 8, 9.

[23] Recognize, however, that if in the future the review hearing is used specifically to review an inmate's record then these procedures and requirements would not apply. It is only when the reivew hearing for eligible inmates is used by the Board as a substitute for the annual § 83-1,111(4) parole hearing and thus the procedure through which the parole release decision is made that the due process procedures apply.



forcement and Administration of Justice, *Task Force Report: Corrections* (1967). *See also* R. Dawson, *Sentencing* 253 (1969). It is necessary, therefore, to determine what would be a "well conducted" hearing in compliance with the Due Process Clause.[24]

In order for an inmate's right to a hearing to have any real purpose it must be more than a mere exercise in formality. The Eighth Circuit determined that an inmate had a constitutional right to appear in person before the Board and must be allowed to present documentary evidence, but an inmate is not entitled, in the absence of unusual circumstances, to call witness-

[24] The United States argues that the limits of due process here applicable should be determined by reference to the analogous process of sentencing a convicted offender. *See,* Amicus Brief of the United States at 40. The Inmates have agreed that there are, indeed many similarities, *see,* n.13, *supra* and accompanying text. But, such acknowledgement does not support the conclusion that the same procedures apply. The similarities involve the nature of the interest involved, and therefore support the conclusion that due process applies, this Court having held that due process must be accorded in sentencing proceedings, e.g. *Gardner* v. *Florida,* 430 U.S. 349 (1977), despite the discretionary aspects thereof. The type of procedures applicable cannot be determined through such a comparative analysis. Each case must, rather, be determined on its own facts. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). The sentencing process comes immediately after a criminal proceeding at which the full panoply of due process rights have been accorded. Many of the factors which the sentencing judge must consider will have come to the judge's attention through that process. *See, United States* v. *Grayson,* ____ U.S. ____, 98 S.Ct. 2610 (1978) (June 26, 1978). A parole board has no similar proceeding upon which to rely for much of its decision-making process. It is not, therefore, appropriate to suggest that the procedures required should be the same.

es in his behalf. (A. 20-21, 23) As the Petitioners suggest, the present Nebraska system does allow an inmate to appear in person and to present evidence in his behalf including the right to call witnesses during a parole hearing. *See,* Petitioner's Brief at 31. The Board, however, suggests this is not constitutionally mandated.

Far and away, the right of an inmate to be present and allowed to present evidence at a parole release hearing is the most important aspect of the parole release proceeding to the inmate *See, Wolff* v. *McDonnell, supra,* 418 U.S. at 566. Without a hearing at which the inmate is present, it would appear to the inmate that his liberty interest would be subject entirely to the whims, hunch or caprice of the Board. A hearing not only will allow the inmate to discuss fully with the Board what his deficiencies are, how he may improve, or the standards required of him, but will also lend credibility to the system and will eliminate the hopeless frustration of a prisoner who is simply told that his parole is denied without ever having the opportunity to voice his concerns. Without the right to appear in person and present evidence, the inmate will wonder without answer whether he could have brought some fact to the Board's attention which might have made a difference; or, wonder how his behavior and attitude could have changed. Finally, the right to be present at a hearing and present evidence will eliminate the fear of the inmate that there is nothing he can do that will make a difference in the outcome.



This Court should make clear, moreover, that a hearing in conformity with the Due Process Clause must be more than the *pro forma* ritual that occurs in many jurisdictions. In Nebraska, for example, the average length of a review hearing is five to ten minutes (R. 16, 43), hardly an adequate time period for the Board to canvass the multitude of factors the Board is required to consider in its decisionmaking. NEB. REV. STAT. § 83-1,114 (Reissue 1976). Although it would be unwise to fix a minimum time for parole release hearings, it is important for the Court to impress on parole boards that, for the hearing to be constitutionally adequate, it must be held "in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545 (1965). The essential need is to recognize that the burden of processing cases shouldered by the Board must be tempered by the prisoner's constitutional right to a meaningful hearing. If this change means a modification in the hearing practices of the Board (*e.g.,* use of hearing examiners) it will not be the first time that constitutional imperatives have affected—and ultimately benefitted—decisionmaking processes.[25] *E.g., Morrissey* v. *Brewer, supra.*

The Eighth Circuit held that in the absence of unusual circumstnaces, an inmate does not have a constitutional right to call witnesses in his behalf in a

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[25] The Board has attacked the Eighth Circuit's requirements of a formal hearing, in part, on the basis of the increased administrative burden which might result. *See* Petitioners' Brief at 32. It first claims that the number of hearings required will be sig-

formal parole hearing. (A. 21, 24) The disallowance of this procedure, however, is a departure from this Court's holding in *Wolff* v. *McDonnell*, 418 U.S. 539

nificantly increased. While the record does not specifically support any such contention, the Inmates acknowledge that the number of formal parole hearings would be increased. The Inmates see no reason, however, for an increase in total number of both formal parole hearings and review hearings conducted. True, if the Board continued its present practice of conducting a review hearing in each case, prior to a parole hearing, affirmance or expansion of the Eighth Circuit requirement would result in additional hearings. However, if the Board were to combine the two hearings for eligible inmates (rather than following its present practice of substituting the review hearing for the parole hearing), complying with the Due Process Clause at the single hearing, only longer hearings, not both longer and more hearings, would be involved. The Board conducted 1,645 review hearings and 327 parole hearings during the period of July 1, 1975 through June 30, 1976. (Pl. Ex. 3, p. 17, R. 3,3). Through a constitutionally adequate combined procedure, 327 review hearings could thus have been eliminated, and, of the total 1,645 review hearings, only those inmates who hearings, only those inmates who were eligible for parole would have been entitled to a constitutionally prescribed hearing whereas the Board could have continued its present practice of conducting an abbreviated hearing for inmates who are not eligible for parole.

The Board also suggests that significant administrative burden will result from the requirements imposed by the Eighth Circuit in that parole plans will necessarily be required to be prepared for inmates having no reasonable possibility of parole. The Inmates are confident that the District Court can, in its supervision of the Board's preparation of procedures consistent with this Court's opinion, balance the interests involved and arrive at a fair accommodation of the Inmates' interests and the Board's desire to prevent needless preparation of parole plans for inmates who are unlikely to receive favorable consideration by the Board. Perhaps, procedures could be adopted whereunder such parole plans will be prepared by institutional employees



(1974), the case upon which both the District Court and the Eighth Circuit modeled their due process requirements.[26] In that case this Court held that an in-

only for inmates having served a specified portion of their sentence, without disciplinary action having been taken against them, or, employing some other objective criteria for determining which inmates will receive assistance in the preparation of such a plan. If, in considering a prospective parolee for whom a plan has not been prepared under such guidelines, the Board should conclude that, but for the absence of an acceptable parole plan, the inmate would be granted parole, then such inmate can be specifically referred for preparation of a parole plan, the Board deferring final action on such inmate's case until receipt of the plan.

[26] The Eighth Circuit's conclusion that the calling of witnesses at parole hearings is not constitutionally required, absent unusual circumstances, may have been based upon considerations similar to those expressed by the United States concerning the "relationship between prisoner and jailer." *See* Amicus Brief of United States, p. 39. It should be remembered, however, that unlike *Wolff* v. *McDonnell*, where such concerns were also expressed, the nature of a parole hearing is not accusatorial in nature. Thus, the risk of confrontation between the "jailer" and prisoners is much less. Moreover, obviously, the interest at stake is much greater, that is, liberty in the immediate future versus liberty in the distant future. It should be further remembered that prisoners at parole hearings in Nebraska have the ability to call witnesses presently. (A. 33). Yet, the Board introduced no evidence showing any disruption to the prison environment as a result thereof. True, the hearings are held within the prison walls, but the concerns expressed by this Court previously do not appear to have presented Nebraska authorities with significant difficulties sufficient to justify restriction of the right to call witnesses at parole hearings. To the extent that such concerns are justifiable, the accommodation made by the District Court is much more defensible. That is, *subject to prison security considerations*, the inmate should be permitted to call witnesses in his own behalf. (Pet. App. 40).

mate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. *Id.* at 565-566. In other words, an inmate was to be allowed to call witnesses except in unusual circumstances, and if the reviewing board declined to allow a witness, this Court suggested that the board should state its reasons for refusing to call a witness. The Eighth Circuit on the other hand determined that the right to call a witness was the exception rather than the rule. The procedure outlined by this Court in *Wolff* should at a minimum control. An inmate has even more at stake in a parole release determination than in the prison disciplinary situation of *Wolff.* In *Wolff,* the inmate stood to lose a reduction in his sentence, or in other words a delayed release at some point in the future. In the instance case, a prospective parolee stands to gain immediate conditional liberty. Therefore, the Eighth Circuit's departure from the *Wolff* procedure was inappropriate.

This Court has previously stated that "[o]rdinarily, the right to present evidence is basic to a fair hearing," *Wolff* v. *McDonnell,* 418 U.S. at 566. An integral component of the right to a fair and meaningful hearing is the right to rebut adverse factual evidence. To be able to effectively do so, of course, the inmate must know what adverse factual evidence has been presented. Presently, Nebraska inmates are not permit-



ted to examine their prison files, and therefore are unaware of what inaccurate information therein contained may be considered by the Board in its determinations. (R. 19, 36, 46, 47, 56). Neither are the inmates permitted to hear any live testimony received by the Board in opposition to parole. (A. 33). To permit such practices to continue would, in large part, run the risk of rendering such hearings meaningless. While prison security considerations may require that the inmate not know the source of the factual information or testimony recieved, he is at least entitled to know the content of any testimony received and the nature of adverse information contained in his file. Certainly, the inmate is not entitled to relitigate past convictions, but to the extent erroneous information is contained in his file, he should be entitled to present to the Board a clarification or correction thereof.[27]

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[27] The Inmates have not heretofore requested advance access to their prison files in preparation for their hearing. They do not, therefore, formally ask this Court to grant this access. However, the Inmates do indicate their agreement with amicus briefs filed in their support which advocate advance access to and knowledge of the contents of prison files considered by the Parole Board. Such advance notice surely will assist the Board in making a fair determination based upon accurate information. Likewise, the Inmates do not here contend that there is a right to confrontation and cross examination, the finding that no such rights existed not having been appealed from the District Court to the Eighth Circuit. The Inmates' interest in knowing what adverse information is possessed by the Board or presented by other witnesses, is, however, viewed as fundamental and should, in order to permit rebuttal as opposed to confrontation, be made a part of the hearing requirement.

The Inmates agree, with the notable exception of the right to know what adverse testimony has been received or is in an inmate's file, that Nebraska complies with these constitutional requirements at a formal parole hearing. However, as was suggested earlier, the present practice of the parole board is to utilize a review hearing as a substitute for the annual parole hearing required under NEB. REV. STAT. § 83-1,111(4) (Reissue 1976). In a review hearing, although an inmate is allowed to be present, he is not allowed to present evidence. (A. 33). Therefore, where a review hearing is used to meet the requirements of a parole hearing pursuant to § 83-1,111(4), an inmate must be allowed the opportunity to present evidence to insure that all facts are brought to the Board's attention. Since a deferral pursuant to a review hearing is equivalent to a denial of parole at a parole hearing, both involve a denial of liberty and both must therefore meet the procedural safeguards.

### C. Due Process Requires Reasonable Advance Notice Of The Hearing And A Listing Of The Criteria Governing The Board's Decision.

Under the present Nebraska system, an inmate is only notified of the month that his case will be set for hearing, whether it be a review or parole hearing. (A. 32). He is not notified of the exact day or hour of his hearing until the very day of the hearing. *Id.* The Eighth Circuit determined that due process entitled an inmate to receive reasonable written notice of the



date and hour for the hearing and under normal circumstances a minimum advanced notice of 72 hours would allow a prisoner a fair opportunity to prepare for his hearing. (A. 18-19, 23).[28]

The Board suggests that notice on the same day is sufficient notice since prisoners seldom go on vacation or have conflicting appointments. *See,* Petitioners' Brief at 30. One can only imagine the frustration of an inmate who, as a result of the limited notice, is unable to make a presentable personal appearance before the Board because of work or other conflicts. If an inmate is to be treated with any degree of dignity, it is insufficient to simply post a notice on the day of the hearing when that hearing may very well by one of the most important events in an inmate's life. Therefore, the present Nebraska procedure for giving notice is constitutionally deficient *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313-314 (1950). Requiring advance notice would not only allow a prisoner to organize and present his testimo-

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[28] The Inmates agrees that 72 hours advance notice is resonable under most circumstances if the Board continues its present practice of previously notifying the inmate of the month of his next hearing. However, if such practice were to be discontinued, 72 hours' advance notice in many cases would be inadequate to permit the inmate to properly prepare for the hearing. Continuance of the present practice of notifying the inmate of the month of his hearing far in advance should be continued as one of the procedures to be adopted by the Board under the District Court's supervision. In addition thereto, of course, the required written notice of the precise date and hour, normally not less than 72 hours in advance, would also apply.

ny, but also would lend credibility to the system by removing the *ad hoc* atmosphere that presently exists.

Along with this written notice requirement, the Eighth Circuit required that the notice be accompanied by a listing of the criteria governing the Board's parole decision. (A. 19-20, 23). Fundamental fairness mandates that an inmate have the opportunity to know and meet the criteria which may affect his decision when such a vital interest is at stake. In order to permit the inmate a reasonable opportunity to marshal facts in support of his conditional release, to clarify any adverse information which may exist in his file, and to rebut unfounded charges with possible mitigating circumstances, an inmate must be informed of the factors and criteria the board will or may take into account and know the standards to which he must conform if he is to be released. *See Franklin* v. *Shields*, 569 F.2d 784, 791-793 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 1003 (1978). The burden on the government is *de minimis* and it is not ludicrous to require that an inmate whose liberty is at stake be notified of what may or may not be a controlling factor in the Board's decision. "One can imagine nothing more cruel, inhuman, and frustrating than serving a prison term without knowledge of what will be measured and the rules determining whether one is ready for relief." Davis, *Discretionary Justice* 132 (1969).



### D. Due Process Of Law Requires That A Record, Capable Of Accurate Reduction To Writing, Be Maintained.

The Eight Circuit determined that a record which is capable of being reduced to writing is constitutionally mandated. (A. 21, 24). This requirement is an essential minimum safeguard to insure that the right of parole is not arbitrarily taken away. Only through some type of record will there be any assurance that the Board acted rationally rather than arbitrarily or, that the Board considered only relevant factors and not constitutionally impermissible criteria. As this Court noted in *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 565:

> Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, . . . the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or pros-

pect of prison disruption that can flow from the requirement of these statements.

While it is true that a tape recording is kept for both parole hearings and review hearings. (A. 33), unless a record is kept that is capable of being reduced to writing,[29] it would be difficult to determine whether the Board acted arbitrarily or relied upon constitutionally impermissible factors.

### E. Due Process Of Law Requires A Full And Fair Written Explanation Of The Essential Facts Relied Upon And The Reasons For Denial.

As a final procedural requirement, the Eighth Circuit ordered that within a reasonable time following the hearing, an inmate who has been denied parole is to be given a full and fair written explanation of the essential facts relied upon and the reason for denial.[30]

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[29] The Inmates' concern in this respect is highlighted by the late-filed exhibits constituting the transcripts of the hearings of inmates James Love, Keith Christensen, Edward Steward and Merlin Scott Abbott, which collectively contained numerous examples of questions, answers or remarks by either Board members or the inmate involved being incapable of translation to written form. While the Inmates do not object to the use of tape recordings, rather than the use of a stenographer, they do strongly assert that the tape recordings utilized must be of sufficient quality to insure the capability of obtaining a verbatim written transcript at a later date.

[30] Every circuit which has held that the due process clause is applicable to parole release determinations has found that the parole board must inform the prisoner in writing of the reasons for denial of his application for parole. *See, Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977) (en banc) cert. denied, 435 U.S. 1003 (1978; *United States ex rel. Richerson* v. *Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); *Childs* v. *United States Board of Parole*, 511 F.2d 1970 (D.C. Cir. 1974); *United States ex rel. Johnson* v. *Chairman, N.Y. State Bd. of Parole*, 500 F.2d 925 (2nd Cir. 1974), *vacated as moot*, 419 U.S. 1015 (1975).



(A. 21-22, 24). It is particularly important with regard to this element to analyze the type of statement the Eighth Circuit considered appropriate to satisfy this requirement.

> We agree with the reasoning of the Second Circuit that for a statement of reasons to satisfy minimal due process requirements "detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based . . . ." *United States ex rel. Johnson* v. *Chairman, N.Y. State Bd. of Parole, supra*, 500 F.2d at 934. *See United States ex rel. Richerson* v. *Wolff, supra; Cooley* v. *Sigler, supra*, 381 F. Supp. at 443; *Candirini* v. *Attorney General*, 369 F. Supp. 1132, 1137 n.8 (E.D, N.Y. 1974). *Cf. Franklin* v. *Shields, supra*, 569 F.2d at 797-98 n. 59, 801.

(A. 22).

In other words, the Eighth Circuit indicated that in order to fulfill the requirement it would not be necessary to conduct an evidentiary or fact-finding hearing and then report the results to an inmate in

the form of a detailed finding of facts. What is necessary, however, is a statement of the reasons sufficient to show that the board did consider the relevant factors and made a rational decision as opposed to an arbitrary one.

The type of statement required by the Eighth Circuit must be viewed in terms of the purposes the statement would fulfill. That is, the Eighth Circuit felt that a statement would facilitate judicial review in those situations where it was allowed; it would promote thought by the board members and would compel them to cover the relevant points and escue irrelevancies; it would promote the goal of rehabilitation by relieving the frustrations of the inmates and instructing them on how they must improve their behavior and better their chances for relief; and finally, it would establish principles and precedents which would promote consistency by the Board.[31] (A. 22-23).

[31] The United States in its Amicus Brief at 46-47 n. 27, strongly criticizes these purposes that a written requirement would fulfill. What must be kept in mind, however, is that these procedural safeguards, like the other minimum requirements of due process, are imposed to protect the inmate from an arbitrary decision. In other words, the procedure is required to eliminate or reduce the possibility that an inmate might be erroneously deprived of his interest. Without a statement of reasons or a summary by the Board of the facts relied upon by it in reaching its conclusion, there is no assurance that the Board did in fact think, no assurance that the decision would be capable of efficient judicial review nor any assurance that the Board acted rationally. While it is true that the Constitution does not require the establishment of precedent, nor does the Constitution require state courts to have records more complete than the state courts believe necessary, what the Constitution does require is a decision which is procedurally fair and rationally reached; and, the requirement of a full and fair written explanation is a means to that end.



In addition to these purposes, the Inmates suggest that a requirement of a statement of reasons and essential facts relied upon would also provide an additional safeguard by preventing the possiblity that the Board relied upon constitutionally impermissible factors or unfounded and unsubstantiated factual conclusions in reaching its decision. *E.g. Wolff* v. *McDonnell, supra*, 418 U.S. at 565.

The present Nebraska system fulfills none of these purposes nor does it provide adequate safeguards against arbitrary decisions. An inmate is not advised of the essential facts relied upon (A. 34), and although they are in most cases informed of a reason for denial, they are told through the use of a standardized letter which in many cases give as a reason for denial "disciplinary report". (A. 45). To inform an inmate that he was denied parole simply because of a "disciplinary report" borders on meaningless. Only when the underlying evidentiary and factual circumstances are adequately summarized can the purposes behind such a requirement be achieved.

Even to a greater extent, the same deficiencies exist when an inmate is informed of the reasons why parole is being denied pursuant to a review hearing. (A. 40-45). A statement of reasons for denial consisting of "your continued correctional treatment, vocational,

educational, or job assignment in this facility will substantially enhance your capacity to lead a law-abiding life when released at a later date" should not be tolerated even under the limited requirement suggested by the Eighth Circuit.

## CONCLUSION

For the foregoing reasons, Respondents request that the determination of the Court of Appeals that due process protection applies to parole release proceedings be affirmed. Respondents further request that in determining what procedures are due, the Court conclude that Nebraska, under its statutory provisions, must conduct formal parole hearings not less often than annually and that all such hearings the inmates must be afforded the right to be present, the right to present documentary and testimonial evidence, and the right to know and rebut any adverse factual information received or in the possession of the Nebraska Board of Parole. In all other respects, Respondents request that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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